Order 96-11-12

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Served: November 18, 1996

Issued by the Department of Transportation
on the 18th day of November, 1996

AMERICAN AIRLINES, INC. *et al.*, and THE TACA GROUP RECIPROCAL CODE-SHARE SERVICES PROCEEDING	**Docket OST 96-1700**
Applications of **AMERICAN AIRLINES, INC.** **AVIATECA S.A.** **COMPANIA PANAMENA DE AVIACION S.A.** **LINEAS AEREAS COSTARRICENSES S.A.** **NICARAGUENSE DE AVIACION S.A.** **TACA INTERNATIONAL AIRLINES S.A.** **TACA DE HONDURAS S.A. DE C.V.** for exemptions under 49 U.S.C. section 40109	**Docket OST 96-1518** **Docket OST 96-1511** **Docket OST 96-1515** **Docket OST 96-1520** **Docket OST 96-1513** **Docket OST 96-1512** **Docket OST 96-1514**
Joint Application of **AMERICAN AIRLINES, INC. *et al.* and THE TACA GROUP** for statements of authorization under 14 CFR Parts 207 and 212 (reciprocal code-sharing services)	**Undocketed**

ORDER ON RECONSIDERATION

Summary

By this order, we grant the Petition for Reconsideration of Order 96-9-15 filed by American Airlines, Inc. ("American") and the TACA Group,[1] on September 23, 1996, in Docket OST-96-1700, *et al.*, but affirm our actions in that order (1) instituting the *American Airlines,*

[1] Aviateca S.A., Compania Panamena de Aviacion S.A., Lineas Aereas Costarricenses S.A., Nicaraguense de Aviacion S.A., TACA International Airlines S.A. TACA de Honduras S.A. De C.V.

Inc., et al., and the TACA Group Reciprocal Code-Sharing Services Proceeding (Docket OST-96-1700*),* and (2) ordering the Joint Applicants to submit the additional data and evidentiary information set forth in the attachment to Order 96-9-15.

Applications and Responsive Pleadings

On July 8, 1996, the Joint Applicants filed separate applications for exemptions under 49 U.S.C. § 40109.[2] Concurrently, they filed a joint application for statements of authorization to engage in certain reciprocal code-sharing services under 14 C.F.R. Parts 207 and 212.[3]

On July 17, 23, and 25, 1996, Continental Airlines, Inc. ("Continental"), United Air Lines, Inc. ("United"), and Delta Air Lines, Inc. ("Delta"), respectively, filed consolidated answers opposing the various applications. These parties generally argued that the statements of authorization and the various extra-bilateral exemption authorities sought here are anticompetitive and are inconsistent with the public interest and the Department's international aviation policy objectives.

On August 1, 1996, American and the TACA Group airlines each filed replies. They argued that, contrary to the opposing parties' characterizations, the proposed code-sharing arrangement is consistent with the Department's International Air Transportation Policy Statement and that there is "ample" existing and "potential" competition in the U.S.-Central America market.[4]

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[2] American applied for an exemption requesting the integration of its certificate authority to serve points in Central America and the Caribbean (Route 137), South America (Route 389), and Mexico (Route 560). Each foreign airline applied for an exemption seeking new and expanded operating authority to serve numerous points in the United States and beyond. The Joint Petitioners stated that they will use this authority to implement a code-sharing arrangement among the seven airlines.

The American and TACA Group's joint application for Statements of Authorization indicates that the parties intend to establish code-shared flights between (1) Dallas/Ft. Worth, Los Angeles, and Miami, on the one hand, and numerous points in the United States, on the other hand; and (2) Dallas/Ft. Worth, Houston, Los Angeles, Miami, New Orleans, Orlando, New York, San Francisco, San Juan, and Washington, D.C., on the one hand, and various points in Canada, Central America, the Caribbean, Europe, Mexico, South America, and Tokyo, on the other hand.

[3] Under the terms of the Agreement entered into on June 21, 1996, American and the TACA Group carriers state their intent to enter into and negotiate the terms of a definitive "Alliance Agreement." The parties state that this proposed Alliance Agreement "will detail the scope of cooperation between the Parties to include, at a minimum, code sharing, reciprocal frequent flyer program participation and other mutually supporting arrangements (the Alliance Agreement)." The Agreement also describes the parties' plan to conclude this definitive Alliance Agreement by September 6, 1996, for a term of 10 years.

[4] The applicants maintain that the proposed arrangement would provide new and expanded entry in international markets and stimulate traffic between the U.S. and points in Central America and elsewhere, and that consumers and shippers would benefit from having a choice of carriers marketing services on flights operated by American and the TACA Group, thereby increasing service and price options. They also argue that consumers would be provided improved connections and other service enhancements, and that communities would benefit from the new or enhanced competitive presence of American and the TACA Group.

On August 13, 1996, United filed a consolidated response, restating its opposition to the applications. Finally, on August 22, 1996, the TACA Group filed a consolidated reply to this pleading.

Preliminary Determinations

Based on our initial review of the various applications, we determined that they lacked certain significant and relevant information needed by the Department to consider this matter fairly and thoughtfully. Therefore, on September 13, 1996, we directed the Joint Applicants to submit additional information and evidence, as a supplement to their applications. We also deferred consideration of this matter pending further notice. Order 96-9-15.

Joint Petition

On September 23, 1996, American and the TACA Group airlines filed a joint petition for reconsideration of Order 96-9-15. The Joint Petitioners object to the Department's decision to require them to submit supplemental evidentiary submissions. They argue that 14 C.F.R. Parts 207 and 212 have no provision for such procedures, and that Order 96-9-15 does not "explain why the Department has departed from its normal practice,...not to require evidentiary submissions" in code-share cases.

The petitioners assert that the Department does not have a consistent policy for processing applications for code-sharing services.[5] They therefore state that the Department's actions in Order 96-9-15, requiring additional evidentiary submissions from the petitioners and deferring consideration of the applications, are "arbitrary and unfair." Accordingly, they ask that the Department withdraw the evidence request outlined in Order 96-9-15, and grant the American/TACA Group applications.[6]

Answers to Petition

On October 3, 1996, Delta Air Lines, Inc. and United Air Lines, Inc. filed answers opposing the petition. On October 4, 1996, Continental Airlines, Inc. filed an answer opposing the petition and a motion to file late.

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[5] The petitioners note that the Department has recently approved code-share arrangements between other U.S. air carriers and foreign air carriers without requiring them to submit supplemental evidence: Delta Air Lines-Aer Lingus (Order 96-4-19); Delta Air Lines-Austrian Airlines/Sabena/ Swissair (*see* OST-96-1598, Notice of Action Taken, dated August 16, 1996); Delta Air Lines-Finnair (*see* OST-96-1835, Notice of Action Taken, dated October 16, 1996); Delta Air Lines-Malev Hungarian Airlines (Order 96-2-48); Delta Air Lines-TAP Air Portugal (*see* Statement of Authorization, dated October 6, 1995, and approved October 21, 1995); and United Air Lines-Saudia Arabian Airlines (Order 96-10-15).

[6] Alternatively, the petitioners maintain that the Department should impose similar evidence requirements on all pending and future code-sharing applications.

Delta maintains that the Department's actions in this matter were appropriate, and required under applicable legal standards. Delta notes that the Joint Applicants seek to implement an "unprecedented" arrangement bringing together all of the major U.S.-Central America carriers.

Delta's position is that the proposed arrangement is not similar to the other code-share applications previously filed with the Department, which the petitioners assert have not been subject to similar evidentiary requirements. Delta maintains that the proposed American/TACA alliance is distinctive in that (1) it will involve cooperation and coordination between the dominant U.S.-flag airline and the dominant foreign-flag airlines in the Central American marketplace; (2) unlike the Delta code-share cases cited by the petitioners, the traveling and shipping public will not have access to on-line competitive alternatives; and (3) the petitioners indicate that they intend to enter into definitive agreements designed to achieve full integration of their various operations.

For these reasons, Delta views this proposed arrangement as unlike any other cooperative arrangement previously approved by the Department, and concurs with the actions taken by the Department in Order 96-9-15. Delta urges that the petition be denied.

United also maintains that the proposed arrangement between American and the TACA Group is without precedent. United asserts that the Department has not previously considered a code-share application in which the applicants exercise the degree of market dominance in so many regional markets as do the Joint Petitioners in this case.

United says that each cooperative arrangement must be subject to independent regulatory review, and judged on its individual merits based on the particular facts and circumstances each case presents. United further states that the proposed agreement should be approved only if the petitioners can demonstrate that the consumer benefits that will result from such an alliance will outweigh any reduction in competition should the alliance be approved. Finally, it is United's view that the Department cannot make such a finding here on the basis of the current record. They therefore urge the Department to continue the proceeding instituted by Order 96-9-15, or, in the alternative, deny the various applications filed by the American/ TACA Group airlines.

Continental urges the Department to deny the requested authority based on the current record. In the alternative, Continental states that the Department must require compliance with the provisions defined in Order 96-9-15.

Continental maintains that the record shows that the American/TACA arrangement would (1) reduce U.S.-Latin American competition and foreclose future network competition for U.S.-Latin American services; (2) perpetuate American's dominance in the Central and South American marketplace; (3) provide American a monopoly position in various Central American markets, where American now faces competition from all of the TACA Group airlines; (4) impede Continental from implementing or expanding its existing code-share arrangement with the TACA Group airlines; (5) prevent new Latin American code-sharing

between U.S. airlines and regional Latin American airlines; and (6) restrain future competition for the American/TACA Group airlines throughout the U.S.-Latin American marketplace.

Finally, Continental urges the Department to expand its information request. Continental asks the Department to require the petitioners to present evidence of any marketing or other agreements American or SABRE[7] have with the TACA Group with respect to participation in U.S. computer reservations systems. Continental alleges that the TACA Group airlines have indicated they intend to "downgrade" their participation in the System One CRS,[8] that they are encouraging travel agents in Latin America to use SABRE exclusively, and that they are "telling passengers that booking on those carriers are not valid unless they are made through American's SABRE."[9]

Findings and Conclusions on Reconsideration

We have carefully considered the pleadings that American and the TACA Group have filed. Based on that review, we find that the American/TACA Group has not presented any arguments that would justify reversal of the actions taken in Order 96-9-15.

As an initial matter, the Joint Petitioners allege that the Department has not previously imposed similar information procedures on other code-sharing applicants. However, we note that, at the request of the Department, United Air Lines and Lufthansa German Airlines,[10] and British Airways and America West Airlines[11] filed supplemental information to support their code-share applications.

American and the TACA Group are seeking authority under 49 U.S.C. 40109 and 14 C.F.R. Parts 207 and 212 for the operations contemplated by their code-sharing agreements. We may not grant their applications without finding that the proposed operations will be in the public interest. The American/TACA Group arrangement presents serious competitive issues which we must investigate before we can determine whether the proposed code-sharing operations will be in the public interest. The purpose of our order was to enable us to obtain the information needed for that public interest determination. Accordingly, we affirm the actions taken by the Department in Order 96-9-15.

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7 American's parent corporation, AMR, is the principal owner of SABRE, a U.S. Computer Reservations System (CRS).

8 Continental recently sold System One to Amadeus, a European CRS, in exchange for 12.4 percent of the Amadeus capital shares. Continental also has a 33 percent ownership interest in a national marketing company that promotes the System One CRS in North America.

9 The Joint Petitioners did not respond to these allegations.

10 *See* Notice served November 3, 1993, Docket 49223.

11 *See* Order 96-6-24, at 3.

The applications raise competitive issues requiring further examination, primarily because of the position currently held by American and the TACA Group carriers in the U.S.-Central America market. The applicants, moreover, plan to create a large-scale alliance and intend to move toward an integration of their services. As a result, even though the applicants have sought neither approval of their agreements nor antitrust immunity under 49 U.S.C. 41308 and 49 U.S.C. 41309, their proposed arrangement resembles the alliances that we closely examined in other recent cases.[12] While the applicants claim that each will independently price its services under the arrangement, the planned cooperative relationship among the applicants may hinder competition between American and the TACA Group carriers.

These facts, among others, require us to examine closely the applications' competitive implications. The applications, of course, present other public interest issues which we must also consider carefully. Since we cannot conduct a thorough examination without additional information, we must require the applicants to submit the information requested by Order 96-9-15 and this order.

The petitioners complain that the Department lacks a consistent policy for the processing of applications for code-sharing services proposed by U.S. and foreign airlines. To support this view, they cite several recent code-share cases that were approved by the Department, absent the evidentiary submission requirement imposed on the petitioners by Order 96-9-15. Based on this, the petitioners charge that our actions in this matter are arbitrary and unfair, and ask that we withdraw our evidence request. In the alternative, the petitioners appeal for the imposition of a similar evidence requirement on all pending and future code-sharing applications.
Although the Joint Petitioners urge the establishment of undifferentiated review procedures, we do not concur. The Department examines judiciously each proposed code-share/blocked-spaced arrangement on its individual merits based on the particular facts and circumstances presented by each case. Accordingly, based on our initial review of the instant requests, we determined that the record of this case lacked certain significant and relevant information, and that the lack of this material prevented the Department from considering these matters in a fair and reasonable manner.

The Joint Applicants have cited several cases to support their claim that no detailed review of their proposed arrangement is required, since in the cited cases we granted authorization for a code-sharing relationship without requiring the applicants to submit much additional information. The cases cited by American and the TACA Group, however, did not raise serious competitive questions, unlike this case. For example, the Delta-Aer Lingus code-share/blocked-space agreement allowed Delta to offer new nonstop U.S.-flag competitive service in the New York-Ireland market.[13] Similarly, the United-Saudia Arabian Airlines code-share arrangement provided an enhanced U.S. presence in the Saudi Arabia market.[14]

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12 *See* Orders 96-6-33 (Delta/Austrian/Sabena/Swissair antitrust immunity case), and 96-5-27 (United/Lufthansa antitrust immunity case).

13 *See* Order 96-4-19, issued April 10, 1996.

14 *See* Order 96-10-15, issued October 9, 1996.

In contrast, the American-TACA Group arrangement constitutes a combination of the major competitors in the U.S.-Central America markets.

As a final matter, Continental, in its October 4 pleading, alleged that the TACA Group's promotion of the SABRE computer reservations system is anti-competitive and unfair. American and the TACA Group airlines did not respond to these allegations. We therefore determine that it is in the public interest to require the petitioners to submit certain additional information regarding this issue, as explained below. The allegations made by Continental require further investigation before we can determine whether to grant the applications filed by American and the TACA Group. We have repeatedly held that U.S. airlines are entitled to a fair opportunity to market an affiliated computer reservations system as part of their right to a fair and equal opportunity to compete in international airline markets. *See*, *e.g.*, Complaint of American Airlines against British Airways, Order 88-7-11 (July 8, 1988); Complaint of American Airlines v. Iberia, Lineas Aereas de España, Order 90-6-21 (June 8, 1990).

ACCORDINGLY,

1. We grant the petition of American Airlines, Inc., Aviateca S.A., Compania Panamena de Aviacion S.A., Lineas Aereas Costarricenses S.A., Nicaraguense de Aviacion S.A., TACA de Honduras S.A., and TACA International Airlines S.A. for reconsideration of Order 96-9-15;

2. We affirm the actions taken by the Department in Order 96-9-15;

3. We further require the Joint Petitioners to submit complete copies of all "agreements/ arrangements," including marketing and any other cooperative agreements/arrangements, that involve American Airlines or SABRE and each of the airlines of the TACA Group related to participation in U.S. computer reservations systems; and all studies, surveys, analyses, and reports that discuss (i) the impact of the proposed code-sharing and cooperative arrangements between American Airlines and any airline within the TACA Group on the marketing of computer reservations systems in Central America or on competition between Sabre, on the one hand, and System One or Amadeus, on the other hand, in Central America, and (ii) the use of the proposed code-sharing and cooperative arrangements for promoting the marketing of Sabre in Central America, dated or produced within the past two years;

4. We grant all motions for leave to file otherwise unauthorized documents; and

5. We shall serve a copy of this order on American Airlines, Inc.; Aviateca S.A.; Compania Panamena de Aviacion S.A.; Lineas Aereas Costarricenses S.A.; Nicaraguense de Aviacion S.A.; TACA de Honduras S.A.; and TACA International Airlines S.A.; the Ambassadors of El Salvador, Costa Rica, Guatemala, Nicaragua, Honduras, and Panama in Washington, D.C.; the Department of Justice (Antitrust Division); the Department of State (Office of Aviation Negotiations); and all other parties in Docket OST-96-1700, *et al.*

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
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(SEAL)

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